



U.S. Department of Justice

Environment and Natural Resources Division

Law and Policy Section
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NOTIFICATION ON RECEIPT OF A CLEAN AIR ACT OR CLEAN WATER ACT CITIZEN SUIT COMPLAINT

The Clean Air Act (CAA) and Clean Water Act (CWA) provide for service of a copy of a citizen suit complaint on the Administrator of the Environmental Protection Agency (EPA) and on the Attorney General. 42 U.S.C. § 7604(c)(3); 33 U.S.C. § 1365(c)(3); 40 C.F.R. § 135.4. In cases in which the United States is not a party, the United States Department of Justice, Environment and Natural Resources Division, Law and Policy Section, receives such materials on behalf of the Attorney General. Upon receipt of a complaint, to assist the parties, the Section provides the following information on the role of the United States Department of Justice and EPA under the statute in question and explains the process our office follows.

A. Review of Consent Judgments

1. *45-Day Review Period.* If the parties choose to resolve a citizen suit rather than continue with litigation, the statutory citizen suit provisions require that any settlement be entered as a consent judgment and that the United States be given at least 45 days to review any proposed consent judgment before its entry by the Court. 33 U.S.C. §1365(c)(3); 40 C.F.R. §135.5. The United States typically uses the entirety of its 45-day comment period. During this period, we may ask the parties for additional information to better understand the elements of the settlement. At the end of its review period, the United States typically expresses whether the United States objects to the proposed consent judgment and provides any comments on the document.¹ The notice provides the United States an opportunity to review potential claims and, if appropriate, to bring its own judicial action before a citizen suit is filed. *See* S. Rep. No. 50 at 28, 99th Cong. 1st Sess. (1985). Congress explained that the United States may also “point out to a court where some ruling or decree would be inconsistent with the government’s enforcement program or interpretation of the law.” *See* 131 Cong. Rec. S3645 (daily ed. March, 28 1985). Senator Chafee added the “amendment is not intended to change existing law that the United States is not bound, since that rule of law is necessary to protect the public against abusive, collusive, or inadequate settlements.” *Id* at 8097.
2. *Instruments Subject to Review.* The Clean Water Act and the Clean Air Act both require that any “consent judgment” in a citizen suit be provided for the United States to review. 33 U.S.C. § 1365; 42 U.S.C. § 7604(c)(3). For purposes of the United States’ right of review, the term “consent judgment” has a broad meaning, and encompasses all instruments entered with the consent of the

¹ Notice also allows the United States to monitor litigation and to assist with judicial review.

parties that have the effect of resolving any portion of the case. This includes documents related to voluntary dismissal, settlement agreements that are not submitted to the Court, and amendments to previously reviewed settlement instruments. The Department monitors citizen suit litigation to review compliance with this requirement. Settlements that do not undergo the statutorily-required review process are at risk of being void.

B. Procedure for Proposed Consent Judgments

1. *Procedures for Lodging Proposed Consent Judgments.* EPA's Clean Water Act regulations set forth procedures for service of proposed citizen suit consent judgments on the Department of Justice and EPA. 40 C.F.R. § 135.5. The regulations also provide a process for lodging such proposed consent judgments with the Court. We draw your attention to these requirements. The regulations state that when a proposed consent judgment is filed or lodged with the Court, "the plaintiff shall notify the court of the statutory requirement that the consent judgment shall not be entered prior to 45 days following receipt by both the Administrator and the Attorney General of a copy of the consent judgment." *Id.* at § 135.5(b)(1). The regulations also require the plaintiff to notify the Court of the date on which the Administrator and the Attorney General received copies of the proposed consent judgment, either at the time of lodging or after the proposed consent judgment is lodged. *Id.*

The Department requests that the parties follow a similar approach in Clean Air Act cases. This will ensure that the Court is notified of the applicable statutory review period and can defer entry of the proposed consent judgment until the government's review is complete.

2. *Mailing Address for Service on the Department of Justice.* EPA's Clean Water Act regulations provide for service of a copy of a proposed citizen suit consent judgment on the Attorney General at a specified street address. 40 C.F.R. § 135.5. As a result of the Department's security procedures, mail sent to that address is automatically subjected to special mail handling procedures that may delay its arrival for a month or longer. **We therefore request that any proposed consent judgments served on the Department of Justice be submitted via email to citizensuitdocs.enrd@usdoj.gov² or sent via certified mail to the following address:**

Citizen Suit Coordinator
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

The Department will treat this as satisfying the statutory requirements set out in both the Clean Water Act, 33 U.S.C. § 1365, and the Clean Air Act, 42 U.S.C. § 7604(c)(3), to serve the Attorney General. (The separate procedures appearing in the regulation for service on EPA remain applicable and should also be followed.) If a copy of the consent judgment is sent only to the

² We have designated this email inbox to receive electronic service of citizen suit complaints and consent decrees. If you choose the use of this method of service, please be advised that you will receive an auto-reply from the inbox confirming your submission was received electronically. If you do not receive this auto-reply, the email was not received and the document has been deemed not submitted. Further, as the auto-reply will explain, you will receive another email confirming successful service and containing further instructions once the email and any attachments have been successfully downloaded. The inbox is monitored only during working hours.

address listed in the regulations, the Department will not regard the 45-day review period as commencing until the special handling process has been completed. You may also arrange for service of consent judgments by fax or email. Please call the Law and Policy Section's main number at (202) 514-1442 to discuss with the Citizen Suit Coordinator or an attorney the process for doing so.

3. Please note that payments designated as civil penalties must be paid to the United States Treasury and should be sent to Alicia Kolaian at the following address:

Alicia Kolaian
Litigation Support Specialist
Environment & Natural Resources Division
Office of Litigation Support
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 305-1996

C. Substance of Consent Decrees

1. *Compliance and Remedies.* In its review, the United States seeks to ensure that the proposed consent judgment complies with the requirements of the relevant statute and is consistent with its purposes. *See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525-26 (1986) (a consent decree should conform with and further the objectives of the law upon which the complaint was based). For example, if the defendant has been out of compliance with statutory or permit requirements, the proposed consent judgment should require the defendant to come into prompt compliance and should include an appropriate civil penalty, enforceable remedies, and/or injunctive relief.
2. *Federal/State Law Claims.* In some instances, a plaintiff will incorporate claims under federal environmental law and state tort law into a single complaint. Note that any resolution of such a complaint should distinguish between the relief attributable to the federal and the state claims. Any recovery of monetary damages should be attributable only to the state-law claims. Recovery of monetary damages by plaintiffs is not permitted under the Clean Air Act or Clean Water Act (although attorney's fees, litigation costs, and compliance monitoring recoveries are permissible in some circumstances). As a rule, a settlement of this type must specifically provide and identify appropriate relief attributable to the federal-law claims consistent with the objectives of the Clean Air Act or Clean Water Act, and should not exclusively allocate relief to the state-law claims. Appropriate types of relief for federal citizen suit claims are discussed in the preceding paragraph (C.1).

D. Additional Resources Available for Citizen Suits

Citizen enforcement actions are an integral component of the CAA's and CWA's overall enforcement schemes. The United States values the contribution that responsibly pursued citizen suits make to protect our nation's air and waters. The United States Department of Justice and EPA play an important role in the citizen suit process by reviewing and commenting on proposed consent judgments. The Department also has some expertise in the resolution of certain common

legal and practical issues that may arise in drafting consent judgments in citizen suit actions, and we are pleased to consult with counsel or review early drafts of such documents.

The Office of Enforcement and Compliance Assurance of EPA also has information available to the public that may be of assistance to the parties in this action. Many of these resources are available on EPA's Civil Enforcement webpage: <http://www2.epa.gov/enforcement>. For more information regarding EPA resources, please contact Gregory Fried at (202) 564-7016 regarding the Clean Air Act or Dane Wilson at (202) 564-0544 regarding the Clean Water Act.

Additionally, the United States participates as *amicus curiae* in some citizen enforcement actions. Please contact the assigned attorney in the Department's Law and Policy Section if a legal issue arises in the case that you believe may be of interest to the United States.

E. Conclusion

We are pleased at any time to discuss these and other principles related to citizen suit actions. It is our hope that through discussions early in the process of resolving a citizen suit we can provide useful information and help to facilitate the prompt, fair and appropriate disposition of these cases. The United States notes for the record that, notwithstanding such discussions or any other involvement, it is not bound by the resolutions of citizen suit matters. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982) (Attorney General is not bound by cases to which he was not a party); 28 U.S.C. §§ 516, 519.